# No. 20,323

# United States Court of Appeals

## For the Ninth Circuit

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HARTFORD FIRE INSURANCE COMPANY, a corporation,
*Appellant,*

vs.

O. T. JONES and RUBY I. JONES,
*Appellees.*

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## APPELLANT'S OPENING BRIEF

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AUGUSTUS CASTRO,
333 Montgomery Street,
San Francisco, California 94104,
MERRILL & MERRILL,
Spaulding Building,
Pocatello, Idaho,
*Attorneys for Appellant.*



PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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### STATEMENT OF PLEADINGS

**I. Jurisdiction of the Court.**

This is an appeal from that portion of a judgment directing a finding of liability against appellant after a trial in the United States District Court for the District of Idaho, Eastern Division, before the Honorable Fred M. Taylor, District Judge, in an action in declaratory relief to determine the rights, liabilities, duties, responsibilities and legal relationship of the parties under the provisions of a policy of fire insurance issued by Appellant.

Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy,

pursuant to sections 1332, 1391, 2201 and 2202, Title 28, United States Code.

The pleadings show that defendants, O. T. Jones and Ruby I. Jones, each was a citizen of the State of Idaho, while plaintiff, Hartford Fire Insurance Company (hereinafter "Hartford") was a corporation organized under the laws of Connecticut, with its principal place of business in Connecticut and authorized to conduct insurance business in the State of Idaho; the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. (C.T. pp. 3-4, 6, 32, 37, 47.)[1]

**II. Pleadings.**

The pleadings consist of a complaint in declaratory relief filed by Appellant; Answer and Cross-Complaint filed by Appellees, and Answer to Cross-Complaint filed by Appellant. (C.T. 3-17.)

**A. Complaint in declaratory relief.**

In its complaint in declaratory relief Appellant, Hartford, alleged its corporate existence under the laws of Connecticut and its authority to conduct an insurance business in the State of Idaho. It alleged that Appellees were the owners of a motel building situated one and one-half miles west of Arco, Idaho and all the personal property located therein with the exception of some personal property located in one unit of the motel; execution of a standard Idaho fire insurance policy insuring Appellees against loss

[1]"C.T." refers to clerk's transcript of record designated as Volume 1 in this record on appeal.

by fire to said motel up to a limit of liability of $28,000 and loss by fire to personal property located therein up to a limit of liability of $7,000, with a lender's loss payable endorsement, making the loss payable first to the Standard Insurance Company, as its interest may appear; that on June 11, 1963 the motel and personal property were wilfully set on fire, and receipt of a sworn statement in Proof of Loss executed by Appellees wherein they claimed the sum of $21,212 as building loss and the sum of $5,000 for loss of personal property. It further alleged that Appellees entered into a conspiracy to defraud Appellant by wilfully causing said fire and filing a false and fraudulent sworn statement in proof of loss; pursuant to said conspiracy, Appellees wilfully caused the fire, and filed a false and fraudulent proof of loss wherein they denied knowing the cause of the fire; that they had done nothing to violate the conditions of the policy or attempt to deceive the company, and that Appellees overstated the amount of loss and damage; that Appellees had violated provisions of the policy relating to Concealment, Fraud, duty of insured to save and preserve the property, and increase hazards; that the actual cash value and amount of loss was substantially less than that claimed by Appellees; that an actual dispute and present controversy existed in as much as Appellant contends that it was under no obligation to pay any insurance proceeds to Appellees by virtue of said violations and the fraudulent conspiracy. Appellant additionally contended that it should be indemnified by Appellees for any amount

Appellant was obligated to pay to said loss payee, Standard Insurance Company. (C.T. pp. 3-6.)

**B. Answer.**

In their answer, Appellees admitted all the allegations of the complaint, except they denied wilfully causing said fire, denied violating the provisions of the policy and denied filing a false and fraudulent sworn statement in proof of loss. They alleged that if said fire was willfully caused by some person said loss was still covered under the terms of the policy and that a dispute and controversy existed because Appellant refused to pay the amount due under the terms of the policy. (C.T. pp. 8-9.)

**C. Cross-Complaint.**

In its cross-complaint, Appellant realleged the facts as to citizenship, amount in controversy; ownership of the property subject only to the interest of a mortgagee, Utah Mortgage Loan Company; existence of a standard Idaho fire insurance policy with the terms and limits as set forth in the complaint which was in effect on the date of the fire; the fact of fire; timely filing of a sworn statement in proof of loss; compliance with all covenants and conditions of the policy; demand for payment in the amount of $30,000.00 and $2,000.00 as attorney's fees, and failure to pay. (C.T. pp. 11-13.)

**D. Answer to Cross-Complaint.**

In its answer to the Cross-Complaint, Appellant admitted the allegations as to citizenship; the

existence of a standard Idaho fire insurance policy; the fact of fire; receipt of the sworn statement in proof of loss filed by Appellees and demand for payment and refusal by Appellant. All other allegations were denied, either specifically or because of insufficient knowledge or information on the part of Appellant. Appellant further re-alleged, re-adopted and re-affirmed the allegations contained in its complaint in declaratory relief as an affirmative defense to Appellees' cross-complaint. (C.T. pp. 14-16.)

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## STATEMENT OF THE CASE

This is an action on an Idaho standard form fire insurance policy. (Ex. 1.) Appellant contended that Appellees committed fraud, concealment and false swearing, relating to material facts and circumstances, such as knowledge of the time and origin of the fire (incendiary), fraudulent proof of loss, and wilfull overstatement of value and damage; and they conspired to defraud Appellant by setting said fire and submitting a false proof of loss.

About 2:05 a.m., on June 11, 1963, the Arco fire department received a call for a fire inside each unit of the four unit motel located on highway 93A, approximately one and one-half miles west of Arco, Idaho, owned by Appellees, Mr. and Mrs. O. T. Jones (R.T. 14.)[2] A separate fire originated in each unit in

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[2]"R.T." refers to reporter's transcript designated as Volume 2 in this record on appeal.

the vicinity of small electric stoves situate therein, and spread upward and outward within the respective units. The fires in Units 2 and 3 burned to a point where they joined. The fires in Units 1 and 4, the units located at either end of the building, were unconnected with the burning in Units 2 and 3, and there was no joining of charred wood. (R.T. 19, 21, 22, 25.)

At the time of their arrival, members of the Arco Fire Department gained entrance into each unit by breaking through the doors and windows. (R.T. 16.) After suppressing the fire, fire personnel observed in Unit 1 a trail of cloth on the floor leading from the stove into the bedroom. The cloth had an odor of kerosene or distillate—a petroleum product. (R.T. p. 20.) In Unit 4 they observed a similar trail of rags leading from the waste basket to the bedroom; this trail, as well as the bed clothes themselves, had an odor of a petroleum product. (R.T. 23-24.) They also detected an odor on a rug located on the floor in Unit 4. (R.T. 24.) A subsequent investigation by fire personnel, in the company of an agent of the National Board of Fire Underwriters, revealed that underneath one of the burners on each stove in Units 1, 2 and 3 there was green plastic material. (R.T. 27-28, 134-135.) In Unit 4, the same green plastic material was found either underneath the burner, or over the front of the stove. (R.T. 27-28, 136.) There was found in Unit 1 a greenish plastic jug similar to that used as a container for Purex or Clorox from which the top had been cut. (R.T. 29, 64.) The burner controls on all of the stoves were in the "on" position. (R.T. 64-65, 66-67, 86-87, 133.)

Mr. Steve Kennedy, Special Agent for the National Board of Fire Underwriters and the Arco Fire Chief testified that they had investigated this fire and both were of the opinion that this was a set fire. (R.T. 29, 137.) Mr. Kennedy stated that it was his opinion that combustible material was placed in plastic containers, placed on a burner of each stove and the heat from these burners ignited the combustible material. His estimate was that such ignition would take over thirty minutes. (R.T. 138.)

On Saturday, June 8, 1963, Appellee, Mrs. Ruby Jones, was in the motel at about 4:00 p.m. and when she left the premises all of the doors were locked. (R.T. 110, 203, 206.) No one had the keys to Units 1, 3 and 4 other than Appellees, and the keys to Unit 2 were in the possession of Appellees and a tenant who was not in the area at the time of the fire. (R.T. 109-110.)

There was no means of ready access from the individual units in the motel so that entry to any individual unit would not give one access to other units.

On Monday, June 10, 1963, Appellees left Arco before noon for Caldwell and Jerome, Idaho. (R.T. 170-171.) Appellee, O. T. Jones, testified as to their activities during the afternoon and early evening hours of June 10, 1963. (R.T. 172-175.) They left Jerome and drove to Shoshone, Idaho—a distance of about twenty miles, arriving there at approximately eleven. (R.T. 175-176.) After a conversation with an unidentified individual, Appellees testified that they

checked into Young's Motel in Shoshone at about 11:00 p.m., and finally retired for the evening about midnight. (R.T. 176-178.) There was no evidence, other than Appellees testimony, which placed them in Shoshone during this period of time. The owner and operator of Young's Motel specifically contradicted Appellees' testimony as to the time they checked into the motel. She testified that she had registered Appellee into the motel between five and five-thirty on the afternoon of June 10, 1963, and that she did not see him again until the afternoon of June 11, 1963. (R.T. 258, 261-262.) At that time Appellee returned to the motel and requested a receipt for the lodging of the night before. (R.T. 195.) Shoshone is about 90 miles from Arco, a drive of approximately one and one-half hours. (R.T. 191.)

Appellee, O. T. Jones, testified that they left Young's Motel in Shoshone at about 7:00 a.m. on June 11, 1963 and drove to Caldwell where they arrived at eleven. They at that time learned of the fire at their motel in Arco, and, after a visit of about one hour, returned to Arco. (R.T. 178-180.) Enroute to Arco, they stopped in Shoshone to obtain a receipt from Young's Motel. (R.T. 195.)

Appellees had a financial motive to conspire to defraud Appellant. Unit 1 of the motel had not been rented since December, 1962; Unit 2 was rented at the rate of sixty-five dollars a month; Unit 3 had been vacant since November 18, 1962; Unit 4 had been vacant since July 1, 1962; (R.T. 106-109) Appellees owned a farm and had realized no income on that farm

from January, 1962, to the date of the fire; there was a first and second mortgage against the motel in the amount of $5,390.00 with a payment due on July 1, 1963 in the amount of $450.00; Appellees had two other mortgages with Utah Mortgage Loan in the amount of $11,000.00 and $865.00 with payments due on July 1, 1963 in the amount of $953.00 and $52.00 respectively; Appellees had two other mortgages in the amount of $11,500.00 and $905.00 with payments due on July 1, 1963 in the amount of $1,035.00 and $82.00 respectively; Appellees had a note in the amount of $2,100.00 with the Custer County Bank, at least a portion of which was past due in June, 1963; Appellees had an obligation to the Butte County Bank of $5,000.00 which was delinquent in June, 1962; Appellees had an obligation with the Prudential Federal Savings and Loan in the amount of $3,750.00 which was delinquent in June, 1963. Appellees' tax return for 1962 shows that their business income for that year was a loss of $327.24. (R.T. 111-120.)

Prior to the fire at their motel on June 11, 1963, Appellees had sustained three previous fire losses; one was the fire loss in a potato cellar in Arco in 1960; a fire loss on this same motel approximately ten years before and a fire loss on a private residence in Blackfoot, Idaho. (R.T. 121-122.)

The questions involved in this appeal and the manner in which they are raised are as follows:

1. The error of the trial Court in withdrawing from the jury, the issue of Appellant's liability. At the conclusion of the evidence, Appellees moved for a

directed verdict as to liability; said motion was granted and the Court did not submit to the jury the issues of fraud and concealment, relating to the origin of the fire, and conspiracy by wilfully causing the fire and filing a false proof of loss.

2. The error of the trial Court in instructing the jury that the only questioning remaining for its consideration was the amount of damages and withdrawing from the jury the following issues:

(a) Violation of the fraud and concealment provisions of the policy;

(b) Fraud and concealment as to knowledge of the origin of the fire;

(c) Fraud and concealment as to the actual value of the property and the actual damage and loss suffered.

was raised by exceptions noted to said instructions.

3. The refusal of the trial Court to allow Appellant to claim surprise as to the testimony of Betty Oldham; cross-examine her as to her prior statements; introduce her written statement which was marked as Exhibit 10 for identification and introduce testimony of prior inconsistent statement.

## SPECIFICATIONS OF ERROR

Appellant urges that the trial Court erred in:

I. GRANTING APPELLEES' MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF LIABILITY AND REFUSING TO SUBMIT TO THE JURY THE DEFENSES OF AN INCENDIARY FIRE AND CONSPIRACY TO DEFRAUD APPELLANT BY SETTING THE FIRE AND BY FILING A FALSE AND FRAUDULENT PROOF OF LOSS. (R.T. 288, 293.)

At the conclusion of all the evidence, Appellees moved for a directed verdict on the issue of liability asserting that there was no evidence connecting Appellees with the setting of this fire. (R.T. 284-286.) This motion was opposed by Appellant on the grounds that there was sufficient direct and circumstantial evidence to raise a jury question on the issue of liability. (R.T. 286-288.) At the conclusion of argument the Court stated:

> "I will have to admit there is evidence in the record which might cause somebody to suspect something. It is like charging somebody with a crime. There is the suspicion and here the insurance company has done just that, but in the opinion of the Court there is no evidence in the record which would connect these defendants with setting the fire. There may be some circumstances which might cause somebody to question whether they were at a certain place at a certain time, but as to the liability question, I don't think the insurance company has shown that these people had anything to do with setting the fire. The evidence shows that it was a set fire, but I can't see how, even on instructions to the jury, how this Court can submit the question to the jury and consequently, I am going to instruct the jury and

withdraw the question of liability from the jury, and instruct them that they should only find the damages. The motion is granted."

It then proceeded to instruct the jury as follows:

"You are instructed that the court has withdrawn from your consideration and determination the question of the liability of the plaintiff, Hartford Fire Insurance Company, to the Defendants and counterclaimants, O. T. Jones and Ruby I. Jones. Stated another way, the defendants and counterclaimants are entitled to recover the amount of damages they sustained by reason of the fire in their motel. The only question remaining for your determination is the amount of damages the defendants and counterclaimants are entitled to recover under the insurance policy."

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**II. REFUSING APPELLANT'S CLAIM OF SURPRISE AS TO THE TESTIMONY OF BETTY OLDHAM; REFUSING TO ALLOW APPELLANT TO CROSS-EXAMINE HER CONCERNING HER EARLIER STATEMENTS; REFUSING TO ADMIT HER WRITTEN STATEMENT, AND REFUSING TO ALLOW TESTIMONY OF PRIOR INCONSISTENT STATEMENTS.**

Appellant called a witness, Betty Oldham, in its case in chief and started to examine her concerning her activities on the night of June 10-11, 1963. Mrs. Oldham testified that at the time of the fire she lived behind the Appellees in a house which she rented from them. (R.T. 40-41.) In the course of this examination the following occurred:

"Q. Mrs. Oldham, did you see a car parked in the area around the Jones home?

* * *

The Witness: No, sir." (R.T. 42.)

* * *

"Q. Did you see a red and white car there?
A. I might have, I don't remember." (R.T. 43.)

* * *

"Q. Didn't you go over and strike a match to see the license plate of a car?

* * *

The Witness: No, sir." (R.T. 43.)

Shortly thereafter, Appellant had marked for identification Exhibit 10, which was a two page document bearing Mrs. Oldham's signature. (R.T. 44.) The witness then read the statement, but her memory was not refreshed by reading the statement. However, she testified as follows (R.T. 49-51):

By Mr. Merrill:

"Q. Mrs. Oldham, when you gave the statement and you signed the statement and stated that it was true, isn't it a fact that the statements in there are true?

A. I don't understand.

Q. The statements that are in the written statement that you have in front of you, those were told to you by [sic] Mr. Kennedy with the Chief of Police, Jardine, there?

A. Yes, sir.

Q. And you were attempting to tell them the truth?

A. Yes, sir.

Q. And they read the statement to you and you signed it?

A. Yes, sir.

Q. And is it your statement now that you don't recall whether you lit a match?

A. There is a lot I don't remember.

Q. You don't remember at this time? Does the reading of the statement bring it back to your mind?

A. No, sir.

Q. You just have no recollection about whether you lit the match?

A. I don't remember.

Q. You just don't remember?

A. No, sir.

Q. You said there might have been a red and white Ford car parked there?

A. I don't remember.

Q. Didn't you, just a few minutes ago, say there might have been a red and white Ford?

A. There might have been.

Q. Do you have any recollection at this moment whether you did or did not?

A. No."

* * *

By Mr. Smith (R.T. 53-54):

"Q. And your testimony is that you are not able to remember what happened that night?

A. Yes, sir.

Q. That is the truth?

A. Yes, sir."

* * *

By Mr. Smith (R.T. 55):

"Q. And isn't it a fact that you told the Sheriff and Mr. Jardine, the Chief of Police, at that time, that you could not remember what happened that night because you had been drinking?

A. Yes, sir.

Q. And that was after you signed this statement—whatever it is—wasn't it?

A. Yes, sir. It was—I'm sorry——

Q. And is it not a fact that you could not remember what happened that night because you had been drinking; isn't that the truth?

A. Right."

Appellant offered the statement into evidence on two grounds; first, it was admissible as evidence of past recollection recorded; second, that it could be used as impeachment based on his claim of surprise. (p. 148-150.) At that point the Court reserved ruling but stated in part:

> "She did not admit the truth of the statement. She didn't admit that on the witness stand. You were permitted to interrogate her, which goes along the lines of the cases which you cited. As far as surprise, I don't think that you can claim that. If you didn't talk to the witness and go over the statement as a witness, obviously you should have. I don't think there is any surprise. The statement was given in September of 1963 and it seems to me that this was no surprise—there could be no surprise here. It might be, depending upon saying what was in the statement, but you could have known before she took the witness stand whether she was going to say these things she did. You called her as your witness." (R.T. 152.)

The Court eventually ruled that Exhibit 10 was inadmissible. (R.T. 283.)

Further, Appellant sought to question Mr. Kennedy, Chief of Police Jardine and Sheriff Johnson concerning the earlier statements. During direct examination of Chief Jardine the following occurred:

By Mr. Merrill:

"Q. Do you know whether Mrs. Oldham was asked if she saw a red and white Ford in the vicinity on the morning of June 11 in 1963?

Mr. Smith: To which I object, it is an attempt to impeach the witness of the Plaintiff and the matter has been gone into and ruled upon.

The Court: Objection sustained." (R.T. 92-93.)

* * *

By Mr. Merrill:

"Q. Did Mrs. Oldham at the time that the statement was taken indicate that she could not remember what happened?

Mr. Smith: We object, it is an attempt to impeach the witness.

The Court: Objection sustained."

By Mr. Merrill:

"Q. Did you sign this after Mrs. Oldham did?

A. Yes.

Q. Before Mrs. Oldham signed, did she ask to have any of it corrected?

Mr. Smith: Object on the same ground, it is impeachment.

The Court: Objection sustained." (R.T. 93-94.)

* * *

"Mr. Merrill: It is based on two points: I think we have laid sufficient foundation so that it is within the area of the legal surprise and could be considered as an adverse witness.

The Court: I don't think there is a foundation for surprise. You have not shown that you talked to the witness before coming into court." (R.T. 96-97.)

During examination of Sheriff Johnson the following occurred:

"By Mr. Smith:

Q. Let me ask you this: After this statement was signed, didn't Mrs. Oldham repudiate it before she came to court.

A. She did.

Mr. Smith: Thank you.

Recross Examination

By Mr. Merrill:

Q. What statement did she repudiate; what was the original statement?

A. Well, do you want me to relate?

Q. Yes, the original statement.

Mr. Smith: I object to going into the statement which is hearsay and is an effort to impeach his witness.

The Court: Objection sustained. You do not need to argue it." (R.T. 101-102.)

And in questioning Mr. Kennedy, the following occurred:

"Q. On that occasion, was there a written statement taken?

A. Yes.

Q. Could you tell how it was taken—not what was in it?

A. I wrote up the statement after asking her various questions, including some of the informa-

tion that had been given to us on the previous interview.

Mr. Smith: We would like to object, it goes apparently that it is an attempt to impeach one of the plaintiff's witnesses that has testified to the fact.

Mr. Merrill: At this point it is not.

The Court: It has gone far enough. He took a statement. The objection is sustained." (R.T. 139-140.)

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## SUMMARY OF ARGUMENT

It was error for the trial Court to withdraw from the jury the issue of Appellant's liability and refusing to submit to the jury the defenses of an incendiary fire and conspiracy to defraud Appellant by setting the fire and by filing a false and fraudulent proof of loss, as there was substantial evidence entitling the jury to pass on these issues.

The evidence in this case clearly demonstrated that the fire was of incendiary origin. There were four separate fires, each originating inside separate locked units of a single building. There was evidence that inflammable liquids had been used to ignite the fire and to accelerate its spread. Rugs, bedclothing and rags were found soaked with a petroleum base product; in two units the rags were laid as a trail from the stove to the bedroom. Containers were found which apparently had contained this inflammable liquid in areas where such containers would not ordinarily be placed.

The evidence was legally sufficient to establish that Appellees had willfully caused this fire. They were the only individuals who had access to all four units of the motel; the motel was not a paying proposition and had produced no meaningful income for a period of one year prior to the fire. There was sufficient evidence of a financial motive to induce Appellees to wilfully cause this fire and their conduct following the loss was such that the jury could reasonably infer that they were connected with the setting of this fire.

Appellant's claim of surprise was proper. The witness, Betty Oldham, had given a signed statement prior to the trial and Appellant had no reason to believe that she would not testify consistent with that statement at time of trial. When she changed her testimony after being called by the Appellant, it was error for the trial Court to hold that Appellant could not impeach the witness by introducing evidence of her prior inconsistent statements.

Plaintiff's Exhibit No. 10 should have been admitted into evidence. The proper foundation was laid for its admissibility as past recollection recorded, and the witness testified that rereading the statement did not refresh her recollection of the facts themselves, but she testified that at the time she made the statement she was telling the truth.

## ARGUMENT

### I. IDAHO RULE OF LAW APPLICABLE.

In diversity of citizenship cases involving an insurance policy, questions of burden of proof, presumptions, sufficiency of evidence and the interpretation of rights and obligations under a policy are matters of substantive law in which it is the duty of the trial Court to apply the State rule.

*Erie Railroad Co. v. Tompkins* (1938) 304 U.S. 64;

*Palmer v. Hoffman* (1943) 318 U.S. 109;

*Van Meter v. Franklin Fire Ins. Co.* (9th Cir. 1947) 164 F.2d 325;

*Hyland v. Miller Nat. Ins. Co.* (9th Cir. 1947) 91 F.2d 735, 737.

#### A. Idaho Rules on Motions for Directed Verdicts.

The Supreme Court of Idaho has stated on many occasions the principles which control in determining the propriety of granting a directed verdict on any issue. See for example the following language in *McCormick and Co. v. Tolmie* (1926) 42 Idaho 1, 6, 243 Pac. 355, 357, cited with approval in *Conklin v. Patterson* (1963) 85 Idaho 331, 379 P.2d 428, 430:

> "The motion for a directed verdict admits the truth of all the evidence in favor of the defendants and every inference of fact that may legitimately be drawn therefrom (citation omitted), and should have been denied unless there was no evidence material to the defense on any question of fact about which reasonable minds might dif-

> fer, which, if found in favor of the defendants would have supported a verdict for them. (Citations omitted.)"

To this same effect was the holding in *Smith v. Big Lost River Irrigation District* (1961) 83 Idaho 374, 364 P.2d 146 wherein the Court said:

> "This court is firmly committed to the rules that a trial court should not take a case from the jury unless, as a matter of law, no recovery could be had upon any view which properly could be taken of the evidence."

The Idaho Court has further held that in passing on a motion for a directed verdict, the trial Court may not weigh the evidence or resolve conflicts. *Buffat v. Schnuckle* (1957) 79 Idaho 314, 316 P.2d 887. In that case the Court held:

> "The court may not weigh the evidence, or resolve the conflicts therein, or determine what conclusions should be drawn therefrom. That is the function of the jury, and the essence of a jury trial."

An excellent discussion in admitting evidence for the consideration of the jury where the witness' capacity is limited, is found in *O'Shea v. Jewel Tea Co.* (7th Cir. 1956) 233 F.2d 530, 532-534. In summary the Court stated:

> "The fact that the witness was old and admitted that there were many things he could not remember did not furnish sufficient grounds for finding him incompetent to testify as to those things that

> he could remember. When a witness takes the stand, he is presumed to be competent until shown to be otherwise. *Stephan v. United States,* 6 Cir., 133 F.2d 87, 95. There was nothing in this record sufficient to support the trial judge's decision that Dr. Plice was incompetent to testify as to those things that he said he could remember. On the record before us, striking the doctor's testimony and instructing the jury to disregard it was an abuse of discretion. It was prejudicial because the doctor had testified that he remembered that Mrs. O'Shea had had a prior accident in a store. If allowed to stand this would have tended to cast doubt on the truth of Mrs. O'Shea's testimony that Dr. Plice had never treated her for a prior injury. The doctor's testimony would, therefore, have gone to the plaintiff's credibility."

The trial Court in the case at bar failed to heed this clear admonition. Instead it weighed the evidence, passed on credibility of witnesses and failed to accept the most favorable view of Appellant's evidence or draw all legitimate inferences therefrom.

In this case, it is clear that the trial Court violated the above mentioned principles. First, as will be discussed infra, Sections II and III, there was sufficient evidence to justify submitting the question of liability to the jury. Second in passing on this motion, the trial judge passed on the credibility of the witness, Betty Oldham.

> "The rest of the opportunity problem is wrapped up in the evidence of Mrs. Oldham, and we submit that the evidence there is sufficient to create a serious question as to whether they were there.

> The Court: Do you think that anybody could believe the testimony of that witness?"

Third, the trial Court weighed the evidence when it disregarded the significance of the direct contradiction in testimony between the Appellees and Mrs. Young.

> "Several other things, there was an alibi as to where they were. It is disputed by the evidence of Mrs. Young, and if the jury should agree——
>
> The Court: How was it disputed. The only dispute is when they registered. That is not as to where they were."

The jury could well have found this contradiction to be material. Appellees were attempting to establish their presence 90 miles from scene of fire. Their testimony in this regard was false. It was not for the trial Court to reject the significance of its falsity.

**B. Fraud, Conspiracy to Defraud by an Incendiary Fire or False Proof of Loss Are Provable by Circumstantial Evidence.**

In a civil action, a conspiracy, fraud or an incendiary fire is each provable by circumstantial evidence.

**1. Incendiary Fire.**

Exhaustive research has failed to reveal any Idaho cases directly in point, but this Court is not without guidance. The State Courts in California have had a number of opportunities to pass on this question, particularly in criminal cases, and they have uniformly

held that circumstantial evidence, even in criminal cases with their more difficult burden of proof, is sufficient to prove the incendiary nature of a fire.

*People v. Hays* (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

*People v. Freeman* (1955) 135 C.A.2d 11, 15, 286 P.2d 565;

*People v. Miller* (1940) 41 C.A.2d 252, 106 P.2d 239.

Other jurisdictions in this circuit have also held that circumstantial evidence was sufficient to support a criminal conviction of arson.

*State v. Van Bogart* (1958) 85 Ariz. 63, 331 P.2d 597, *cert.den.* 359 U.S. 973;

*State v. Gore* (1940) 152 Kan. 551, 106 P.2d 704;

*O'Briant v. State* (1956) 72 Nev. 100, 295 P.2d 396;

*State v. Molitor* (1955) 205 Oregon 698, 289 P.2d 1090;

*State v. Turner* (1961) 58 Wash.2d 159, 361 P.2d 581.

No reason can be advanced why this same rule would not be followed by an Idaho State Court if it were called upon to rule on this question.

**2. Fraud.**

*Penn Mut. Life Ins. Co. v. Ireton* (1937) 57 Idaho 466, 65 P.2d 1032, 1039. Fraud is to be determined from all the facts and circumstances of the case. Again, as on the issue of the incendiary fire, we may

look to relevant authorities in other jurisdictions. In California, the courts have frequently held that fraud may be proved by circumstantial evidence.

*Batchelor v. Finn* (1959) 169 C.A.2d 410, 341 P.2d 803;

*Dandini v. Dandini* (1953) 120 C.A.2d 211, 260 P.2d 1033.

To the same effect in other jurisdictions are the following:

*Breidenthal v. Breidenthal* (1957) 182 Kan. 23, 318 P.2d 981;

*Walker v. Mink* (1945) 117 Mont. 351, 158 P.2d 630;

*Saunders v. Visser* (1944) 20 Wash.2d 58, 145 P.2d 898.

While the burden of proving such defenses is on the insurance company, it does not have to be proved beyond "reasonable doubt" as required in a criminal prosecution; but the insurance company has met its burden when any of said defenses are established by a mere preponderance of the evidence, because it is a civil case. *Young v. California Ins. Co.* (1935) 55 Idaho 682, 46 P.2d 718, 720, where the Idaho Supreme Court approved instructions stating that "one alleging fraud has the burden of proving it by a preponderance of the evidence." This is also the rule in other relevant jurisdictions.

*Treadwell v. Nickel* (1924) 194 Cal. 243, 260, 228 P. 25;

*McIntosh v. Eagle Fire Company of New York* (4th Cir. 1963) 325 P.2d 99.

## II. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH INCENDIARY FIRE.

About 2:05 a.m., on June 11, 1963, the Arco Fire Department received a report of a fire in the motel owned by Appellees, located on highway 93A, approximately one and one-half miles west of Arco, Idaho. This fire caused damage to the building and the personal property contained therein. (R.T. 14.)

### A. Description of Building.

This motel was a single building approximately seventeen feet wide and one hundred twenty-five feet long which ran roughly east and west, perpendicular to the highway. This single building was divided into units, each of which was separated from the other by a wall which contained no door or other means of common access. The only access to each unit was by means of an outside door. The two center units had windows on the front and rear walls, the end units had windows on the side, as well as the front and rear. (R.T. 168-169.) The four units of the motel were similar in size and lay-out, each contained a kitchen, bedroom and bath. The furniture in the kitchen consisted of a stove, refrigerator, table and chairs. In the bedroom there was a bed, chairs, dresser and a chest of drawers. (R.T. 186, 206, 207.) In the ceiling of each unit there was a covered opening which led into a common attic space. These openings were located in different places in each unit—kitchen or entrance to bedroom in Unit 1; bathroom in Unit 3, and in a closet in Unit 4. (R.T. 31, 32.) There were no stairs leading to these openings, and access could only be

obtained by placing some object below the opening, removing the cover and pulling oneself up and into the attic. (R.T. 33-34.)

**B. Point of Origin of Each Fire Was in the Area of the Stoves Located in the Kitchens.**

The fires originated separately in each unit and, only in the case of the fires in Units 2 and 3, did the char join. In each unit the area of heaviest burning was around the electric stove, and it was the opinion of the investigative personnel that all fires had started near the stove. (R.T. 21, 101, 136.)

**C. Finding of a Criminal Agent at Point of Origin Is Evidence of Incendiary Fire.**

**1. Presence of Criminal Agent at Scene.**

The unexplained presence of a petroleum product at point of origin and throughout the motel is sufficient to establish a fire is of incendiary origin.

*People v. Gilyard* (1933) 134 Cal.App. 184, 189, 25 P.2d 35;

*People v. Kasparoff* (1928) 94 Cal.App. 7, 9-10, 270 P. 398;

*O'Briant v. State* (1956) 72 Nev. 100, 295 P.2d 396, 397;

*Grimes v. State,* 79 Ga.App. 489, 54 S.E.2d 302.

In *People v. Gilyard, supra,* the Court said:

> "A jar of earth taken by the police from beneath the partially burned house and giving forth the odor of kerosene was admitted in evidence. There was no error here, as this real evidence tended to prove that the fire was of incendiary origin.

2. Existence of Several Unconnected Fires.

The presence of separate and distinct fires on the premises is evidence sufficient to establish that they are of incendiary origin.

*People v. Hays* (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

*People v. Sherman* (1950) 97 C.A.2d 245, 249, 217 P.2d 715;

*O'Briant v. State* (1956) 72 Nev. 100, 295 P.2d 396, 397;

*British America Assur. Co. v. Bowen* (10th Cir. 1943) 134 F.2d 256.

In both *People v. Hays, supra* and *O'Briant v. State, supra,* there were separate fires and the presence of flammable fluids. In *People v. Hays,* the Court held:

> "It has been repeatedly held that incendiary origin of a fire is generally established by circumstantial evidence such as the finding of separate and distinct fires on the premises. (citations omitted) Here, there is evidence of four separate and unrelated fires . . . and that debris smelling of petroleum products was near another hole in the plaster." (101 C.A.2d 305, 311.)

And in *O'Briant v. State,* the Court stated:

> "The testimony of experts establishes that the fire in fact was composed of two independent and unconnected fires . . . . Further pointing toward the incendiary character of the fires was the fact that tests of flooring in each burned corner indicated the presence of petroleum residue. There can be no question but that these facts are ample

to support a determination that the fire was incendiary in its nature." (295 P.2d 396, 397.)

**D. Evidence of Use of Liquid Inflammables to Cause Fire Found at Point of Origin and Throughout Units 1 and 4.**

The evidence showed that in each unit of the motel were found pieces of green plastic beneath an electric burner of the stove. They also found, in Units 1 and 4, a trail of rags soaked in kerosene, oil or petroleum products leading from the stove to the bedroom. (R.T. 27-28, 136.) In Unit 4, they found the bedclothing similarly soaked with a petroleum product. Also, a rug was soaked with a similar product. (R.T. 20, 23-24, 87-88, 90.) The burning in Units 2 and 3 was too complete to recover any similar material from these units.

No evidence was offered by Appellees to account for or explain the presence of such inflammables in any of the units.

**E. Evidence of Four Separate Fires.**

The Arco Fire personnel, and the Special Agent from the National Board of Fire Underwriters, testified that there was evidence of four separate and distinct fires. The burning in Units 1 and 4 was completely unconnected. There was no point at which the char in these units joined the char in Units 2 and 3. Further, although the burning in Units 2 and 3 were connected, it was the opinion of all who investigated that there were separate and distinct points of origin and that the connection resulted from the pattern of burn. (R.T. 21, 101, 136.)

**F. Uncontradicted Expert Opinion Was That This Was a Fire of Incendiary Origin.**

A Special Agent of the National Board of Fire Underwriters investigated this fire and he was qualified at the trial as an expert in the field of arson investigation. (R.T. 131.) He testified that in his opinion this was a set fire. (R.T. 137.) He further testified that it was his opinion that the fire was set by placing flammable liquid in plastic containers and placing these containers on a burner of the electric stove. The burner was then turned on. After a sufficient period of time the heat ignited the liquid, thus causing the fire. (R.T. 137-138.) This testimony was never contradicted or disputed by Appellees.

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## III. EVIDENCE WAS LEGALLY SUFFICIENT TO ESTABLISH THAT APPELLEES WILFULLY CAUSED THIS FIRE.

At the outset, we respectfully submit that it must be conceded that proof of the connection of an insured with the setting of an incendiary fire can seldom be established by direct evidence. Arson is seldom committed in broad daylight and before interested spectators. The courts which have had occasion to pass on this question have recognized this difficulty and have held that the identity of the person or persons who caused a fire may be proved by circumstantial evidence.

*People v. Hays* (1950) 101 C.A.2d 305, 311, 225 P.2d 600;

*People v. Freeman* (1955) 135 C.A.2d 11, 15, 286 P.2d 565;

*Carpenter v. Union Insurance Society of Canton, Ltd.* (4th Cir. 1960) 284 F.2d 155.

Among the circumstances which are held to be relevant are opportunity; access to premises; motive and conduct.

*People v. Hays* (1950), *supra;*
*People v. Freeman* (1955), *supra;*
*British America Assur. Co. v. Bowen* (10th Cir. 1943) 134 F.2d 256, 260;
*People v. Kessler* (1944) 62 C.A.2d 817, 821, 145 P.2d 656.

As was said by the Court in *People v. Hays, supra:*

> "The identity of the defendant as the person who committed the crime may be proved by circumstantial evidence tending to connect her with the crime. [cita. omitted] Such circumstantial evidence may consist of proof of motive and conduct of the defendant which tends to connect her with the crime, and statements which show a consciousness of guilt." (101 C.A.2d 305, 311.)

See also *People v. Freeman, supra,* where the Court said:

> "The circumstances relied upon by the People to sustain the verdict of the jury are the conceded incendiary character of the fires, the opportunity appellant had to set them . . . the heavy indebtedness of the appellant . . ."

All of these circumstances were present in this case.

**A. Appellees Had the Opportunity to Set the Fire.**

Appellee, Ruby Jones, was in the motel on the Saturday preceding the fire. (R.T. 203.) There was no evidence that anyone else was in the motel with the exception of the occupant of Unit 2, who may have

been there on the evening of June 9, 1963. (R.T. 108-109.)

The last eyewitness to Appellees' whereabouts prior to the fire placed them in Jerome at about 10:00 p.m., four hours prior to the fire. (R.T. 227.) Appellees' statement that they checked into Young's Motel in Shoshone at 11:00 p.m. was specifically contradicted by the operator of the motel. (R.T. 258, 266.) Hence, there is no eyewitness who stated that he saw Appellees in Shoshone at any time that evening; in spite of Appellees' statement that they talked to people in Shoshone sometime after their arrival. (R.T. 176.)

In any case, the distance from Shoshone to Arco is only about 90 miles. (R.T. 191.) Thus, Appellees had ample opportunity to return to Arco, set this fire and return to Shoshone.

In *British America Assur. Co. v. Bowen* (10th Cir. 1943) 134 F.2d 256, the insured testified that she spent the evening in a town 39 miles away from the scene of the fire and produced a witness who testified that the insured was there when he retired on the night of the fire and she was there the next morning. In spite of this evidence, the Court, in sustaining a judgment for the company said:

> "The distance from Shawnee to Oklahoma City over paved highway is only 39 miles. No witness saw her from 10:30 p.m., October 3, until the morning of October 4. She could have readily traveled to Oklahoma City and set the fire between 10:30 p.m., and midnight of October 3, and returned to Shawnee before the morning of October 4."

This is exactly the same inference which the jury could well have drawn in the case at bar. See also *Nathan v. St. Paul Mutual Insurance Co.,* 86 N.W.2d 503, where insured was denied recovery when he was seen entering the house the day before the fire, and at the time of the fire he was in Fullerton, Nebraska, which was approximately 500 miles removed from the scene of the fire; or *People v. Becker* (1949) 94 C.A. 2d 434, 210 P.2d 871.

One witness in Arco, Betty Oldham, testified that she might have seen a red and white Ford parked by the Appellees' home some short time prior to the fire. (R.T. 43.) The Appellees owned such a car at the time in question, and testified that this car was in Shoshone during that period of time. (R.T. 122-123, 230.)

No evidence was offered by Appellees, other than their own statements that they were in Shoshone, to show that they lacked the opportunity to set the fire.

**B. No One Had Access to the Motel But Appellees.**

The door leading into each specific unit only gave access to that specific unit. All of the keys to these doors were in the possession of Appellees with the exception of the one key to Unit 2 which was held both by Appellees and a tenant. (R.T. 109-110.)

All of the doors were locked after Appellees left the motel on June 8, 1963 (R.T. 110, 216), and all of the doors were locked when the fire department arrived to suppress the fire, with the exception of the door to Unit 3 which excessive heat had burned out. (R.T.

16.) There were no signs of forcible entry following the fire other than those made by the fire department. (R.T. 60-61.) Thus, the only persons who had access to all the units of the motel were the Appellees.

The fact that a building is locked with no sign of forcible entry when an incendiary fire is discovered is material circumstantial evidence connecting an insured to the fire.

*People v. Kessler* (1944) 62 C.A.2d 817, 821, 145 P.2d 656;

*American Home Assurance Co. v. Essy* (1960) 179 C.A.2d 19, 24;

*British America Assur. Co. v. Bowen, supra.*

It is true that the fire department found a side window in Unit 4, closed, but not locked. (R.T. 34.) But, as has been noted previously, access to Unit 4 gave no ready access to any other unit of the motel.

**C. Appellees Had a Financial Motive to Set This Fire.**

Evidence of financial condition is admissible to establish motive and is material circumstantial evidence which may connect a party with an incendiary fire.

*People v. Freeman* (1955) 135 C.A.2d 11, 14, 286 P.2d 565, where evidence showed insured in debt;

*People v. Richard* (1951) 101 C.A.2d 631, 637, 225 P.2d 938, where evidence showed that destroyed business not profitable;

*People v. Hays, supra.*

As was pointed out in *People v. Richard, supra:*

> "In cases where circumstantial evidence is largely relied upon for conviction . . . then motive becomes a matter of earnest inquiry."

The evidence in this case established a strong financial motive on the part of Appellees. The motel itself had been unoccupied, except for one unit, for over six months, and had had only one other unit rented for a short period for almost one year. (R.T. 106-109.) Hence, it seems clear that the motel was, economically, a losing business.

Further, at the time of the fire, Appellees were delinquent on three notes and payments on other indebtedness were coming due. Mortgage payments totalling $2,572.00 were due as of July 1, 1963. (R.T. 111-120.)

Appellees were the owners of a farm which had produced no income since January, 1962. The income tax statement filed by Appellees showed a loss for the year 1962 in their business income. There was no evidence to establish that Appellees had any ready funds from which they could expect to meet their delinquent obligations and large prospective payments. (R.T. 114, 120.)

The Appellees were well aware of ability to obtain funds as a result of fire losses. The evidence establishes that Appellees had recovered for two other fire losses since 1950, one of which was on this particular motel. (R.T. 121-122.) Past history of fire losses may be considered by the jury in determining whether

Appellees set this fire with intent to defraud Appellant.

*People v. Furgerson* (1962) 209 C.A.2d 387, 25 Cal.Rptr. 818.

**D. Conduct of Appellees Following the Loss Was Such That the Jury Could Infer Their Connection With This Fire.**

At the time Appellees first heard of the fire loss they were in Caldwell, Idaho. Rather than return immediately to Arco, they remained in Caldwell visiting with friends. (R.T. 180.) En route from Caldwell to Arco they stopped at Young's Motel in Shoshone for the express purpose of obtaining a receipt to establish their whereabouts on the evening of June 10-11, 1963. (R.T. 195.) When they returned to Arco they called their attorney. (R.T. 181.) We submit that a jury could well infer that this conduct was inconsistent with Appellees' professed ignorance of the fire. Particularly, is this true of the stop in Shoshone to obtain a receipt for their night's lodging. Only if they realized at that time that the loss was suspicious would they have felt the need to establish their whereabouts. And the only way they could have realized this was for them to have been connected with the setting of the fire itself.

Therefore, we respectfully submit that there was substantial evidence to support a finding by the jury that Appellees had the only opportunity and access under the circumstances to set this fire; that they had a financial motive to defraud, conceal, conspire to defraud, set said fire and file a false proof of loss,

and that Appellees were connected with said fraud, concealment and conspiracy.

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## IV. APPELLANT'S CLAIM OF SURPRISE WAS PROPER AND IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE EVIDENCE OF THE WITNESS'S EARLIER INCONSISTENT STATEMENTS.

Appellant assigns as error the refusal of the trial Court to allow it to claim surprise as to the testimony of the witness Betty Oldham, and the concomitant refusal to allow Appellant to cross-examine this witness concerning earlier inconsistent statements or introduce, through other witnesses, evidence of her prior inconsistent statements.

### A. Introduction.

Mrs. Betty Oldham was called by the Appellant in its case-in-chief. Prior to the trial she had given a signed statement to Mr. Kennedy, in the presence of Chief of Police Worth Jardine and Sheriff Ben Johnson. (R.T. 45, 91-92, 140.) In this statement she said that she had seen the Appellees' automobile near the scene of the fire a short while prior to the fire. She also said that she was certain that it was Appellees' car as she had struck a match and looked at the license number. (Plaintiff's Ex. No. 10.) However, in the course of her trial testimony, she stated that she did not see a car parked in that area; didn't use a match to look at a license plate, or, at least, didn't remember any of these facts. (R.T. 42-43, 49-51.) Appellant thereupon had the signed statement marked as

Plaintiff's Exhibit No. 10 for identification. Attempts were made to question the witness concerning her change in testimony, but objections to this line of questioning were sustained on the grounds that it was an attempt to impeach the witness. (R.T. 52.) When Appellant sought to introduce, through Mr. Jardine, testimony concerning these earlier statements, a similar objection was sustained. (R.T. 92-97.) Further, objections were sustained to the testimony of Mr. Johnson (R.T. 101-102) and Mr. Kennedy. (R.T. 139-140.) At the time Appellant sought to introduce the testimony of Mr. Jardine, the following offer of proof was made:

> "The Court: Mr. Merrill, state what would be testified by the witness.
>
> Mr. Merrill: Very well. At the time of the occurrence of taking the statement of Betty Oldham, she stated essentially as listed in Plaintiff's Exhibit No. 10 for identification. Secondly, that she did at that time state that she would swear on a stack of bibles that this was true and she saw the vehicle as stated in the statement; that she lit the match and saw the license number; that this was true and that she would swear to the same at any time." (R.T. 95-96.)

It should also be pointed out to show the right of Appellant to claim surprise and to present prior inconsistent statements, that Ben Johnson, a witness for Appellees, testified under questioning by counsel for Appellees, that Mrs. Oldham, in his presence, had repudiated the signed statement (Exhibit 10) on the grounds that she might or could have been in error

(R.T. 102-104.) It should be noted that this was not on the grounds that she could not remember, which was her reason on the witness stand, but as Sheriff Johnson said, beginning at page 102 of the Reporter's Transcript:

By Mr. Merrill:

"Q. Who was present when she repudiated it?

A. The attorney for the Jones and the Jardines, and myself.

Q. Was Mr. Kennedy there?

A. He was not.

Q. Did Mrs. Oldham say she didn't remember?

A. She said she was wrong on the accusation.

Q. She didn't tell you that she didn't remember?

A. No.

Q. Was she able to remember when she repudiated it?

A. It appeared so.

Q. Did she tell you why she was repudiating it?

A. No.

Q. Did she tell you that somebody had talked to her?

A. She said that the statement was untrue.

Q. Did she tell you how she found out?

A. No.

Q. Did she tell you if she had been talked to?

A. No.

Q. Did she talk to you at any other time?

A. Not to me.

Q. As far as you know, she did not?

A. Not to my knowledge.

Q. What she told you is that she found out she was wrong?

A. Yes.
Q. And she stated she did not remember?
A. No.
Q. She did not tell you where she found out?
A. She may have confused two nights. She changed her first statement and that was the only reason I know of that she changed her statement that it could have been another night.
Q. It could have been?
A. Yes."

The accumulated effect of all of the testimony by Mrs. Oldham and concerning Mrs. Oldham showed that the Appellant should have been sustained in the claim of surprise and should have been allowed to question the witness concerning her signed statement and other statements made by her, and should have been allowed to present evidence from others, Kennedy, Jardine, and Johnson, concerning inconsistent statements made by the witness.

Appellant respectfully submits that this impeaching evidence was erroneously excluded. This claim is assertedly based not only on relevant federal cases, but also on the clear language of relevant Idaho authorities. Rule 43(a), Fed.R.Civ.P., specifically provides, in part, as follows:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of the evidence applied in the courts of general jurisdiction of the state in which the United States court is held.

> In any case, the statute or rule which favors the reception of the evidence governs . . ."

**B. Idaho Law Allows Impeachment of a Party's Own Witness.**

Section 9-1207, Idaho Code, specifically provides for the impeachment of one's own witness. This Section states:

> "9-1207. Impeachment of party's own witness. —The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made, at other times, statements inconsistent with his present testimony. (R.S., R.C., & C.L., Section 6080; C.S., Section 8036; I.C.A., Section 16-1207.)"

This Statute is unconditional on its face and it validly can be asserted that there need be no showing of surprise. The right is made absolute; thus in the case at bar, the trial Court violated the clear language of this Statute by its refusal to allow Appellant to introduce evidence of Mrs. Oldham's prior inconsistent statements.

In *Wyman v. Dunne* (1961) 83 Idaho 179, 359 P.2d 1010, the Idaho Supreme Court passed on the right of a party producing a witness to impeach his testimony by showing prior inconsistent statements. In addressing itself to this question, the Court held:

> "The attempted impeachment occurred on the re-redirect examination. It consisted of showing to the witness written notes of statements purported to have been made by him to the plaintiff, Wyman, on July 8th after the making of the gift in

question. The writing purports to contain a statement by the witness to the effect that the deceased was 'not fully competent to fully grasp her business and affairs,' and 'not competent to handle business affairs.' Objection was made that the evidence offered was not proper re-redirect examination, and was an attempt to impeach the plaintiff's own witness without showing that the witness was hostile. There is no requirement that the party producing a witness must show that the witness is hostile before he may impeach the witness by showing that he has made statements inconsistent with his present testimony. I.C.A. Section 9-1207. The objection on that ground was not valid and should have been overruled. The same objection was made to a further offer of the same proof; but the objection that it was an attempt to impeach plaintiff's own witness without showing the witness to be hostile, was subsequently withdrawn." (83 Idaho 189.)

Similarly, in *Franklin v. Wooters* (1935) 55 Idaho 619, 45 P.2d 804, the Court held:

"Respondent called one Flemming as a witness and claiming surprise at his assertedly changed statements, was permitted by the trial court over appellant's objections to show under I.C.A., sec. 16-1207, contrary statements. Such course is clearly authorized by the statute and respondent did not transcend the proper limits permitted thereby. (Price Produce & Commission Co. vs. Inter-Mountain Assn. of Credit Men, 43 Ida. 540, 253 Pac. 854; State vs. Cochran, 7 Ida. 220, 61 Pac. 1034; State vs. Gee, 48 Ida. 688, 284 Pac. 845.)"

Based on these holdings, and the language of Section 9-1207, it appears to be obvious that an Idaho State Court, faced with similar facts, would have admitted evidence of Mrs. Oldham's prior inconsistent statements; particularly, where these statements were so crucial to Appellant's defense. The Federal Court is required to do likewise. Rule 43(a), Fed.R.Civ.P.

**C. Under Federal Decisional Law a Party May Impeach His Own Witness Upon a Claim of Surprise.**

There would appear to be little dispute that in the Federal Court a party may impeach his own witness if he claims surprise. See for example the following cases:

*Bieber v. United States* (9th Cir. 1960) 276 F.2d 709, 712-713;

*United States v. Maggio* (3rd Cir. 1942) 126 F.2d 155, 158-159;

*Weaver v. United States* (9th Cir. 1954) 216 F.2d 23, 25;

*Stevens v. United States* (9th Cir. 1958) 256 F.2d 619, 623;

*Debardeleben v. United States* (9th Cir. 1962) 307 F.2d 362, 363;

*O'Shea v. Jewel Tea Co.* (7th Cir. 1956) 233 F.2d 530, 535;

*Journeymen Plasterers' Pro. & Ben. Soc. of Chicago v. N.L.R.B.* (7th Cir. 1965) 341 F.2d 539, 544.

And, the Courts do not require a strong showing a surprise. For example, in *United States v. Kahaner* (2nd Cir. 1963) 317 F.2d 459, the Court allowed im-

peachment upon a "modest showing of surprise." This Circuit in *Bieber v. United States, supra,* held as follows:

> "If the court is satisfied that the 'surprise' exists, either from the statement of counsel or otherwise, that is all that is required to permit the examination of the witness as to his prior contradictory statement." (276 F.2d 712-713.)

In this case, this modest requirement was more than satisfied.

The record demonstrates that Mrs. Oldham had given a signed statement prior to the trial. In reliance on this statement, Appellant placed her on the witness stand and the record is clear that Appellant had received no information that the witness would change her testimony when under oath. The trial Court, in excluding this line of questioning, admitted as much when it said:

> "The statement was given in September of 1963 and it seems to me that this was no surprise—there could be no surprise here. It might be, depending upon her saying what was in the statement, *but you could have known before she took the witness stand* whether she was going to say these things she did." (R.T. 152.)

The evidence in the record was that Mrs. Oldham had talked to no one on behalf of the Appellant subsequent to the time that she gave her signed statement. (R.T. 147.) Thus, it is clear that the only basis for the trial court's ruling was its belief that Appellant's

trial counsel, by failing to interview the witness prior to trial and relying on her signed statement, could not claim surprise. (R.T. 96-97.) Such a holding is contrary to the language of the cases previously cited.

Directly in point on the duty to interview a witness prior to trial is the holding in *Stevens v. United States* (9th Cir. 1958) 256 F.2d 619, 621-623. In that case the argument was made that the failure to contact a witness prior to the trial precluded any claim of surprise. In rejecting this assertion the Court stated:

> "Appellant raises the point that a witness cannot be impeached by the side calling him absent a real showing of surprise, and since the government made no attempt to contact this witness before the trial to check whether she would stand by her previous statement, they cannot now claim surprise as the basis for impeachment. The government replies that when it is under obligation to call all material witnesses it can impeach a witness' adverse testimony, and that it had no reason to believe Mrs. Stevens' statement would be different from her prior statements.
>
> * * *
>
> And although some of the older cases would require the government to investigate prior to trial before claiming surprise, such a rule seems entirely inconsistent with the processes of truth ascertainment (see McCormick, Evidence Section 39) and an undue imposition on the government where they reasonably rely on the prior statements as the truth, to which the witness will again testify (Weaver v. United States, 9 Cir., 1954, 216 F. 2d 23, 25). Thus we conclude that no error

was committed by the trial court in the exercise of its discretion in permitting impeachment of the government's own witness under the circumstances of this particular case.

"Being a hostile witness, it was proper to impeach Mrs. Stevens. The best way in which this could be accomplished was by proof of prior inconsistent statements. This made admissible for purposes of impeachment the notes written by one of the F.B.I. agents at the time the conversation with Mrs. Stevens was had, which detailed the conversation.

"The objection made to Exhibit 11's admissibility was that it was 'incompetent, immaterial, irrelevant, and hearsay as to the defendant.' It was competent, it was material, and it was relevant. It was hearsay as to the defendant to the extent it tended to prove the fact of the matter asserted, that is, defendant's conduct with reference to the Wallace trip. It was inadmissible as substantive evidence. But it was admissible to impeach the hostile witness. Weaver v. United States, supra; Meeks v. United States, supra."

Logic and reason dictate that a similar result follow in this case.

Equally pertinent is the holding in *Weaver v. United States* (9th Cir. 1954) 216 F.2d 23. In that case this Circuit stated:

"She had talked to agents of the Federal Bureau of Investigation previous to the trial, and according to them had turned over to them a diary, which she told them stated facts, and also letters, which she said she had written to Weaver.

"When, on the stand, she denied that she had used the ticket he had sent her to go back to Los Angeles, and denied that she had ridden with him upon the bus and upon the plane, and denied that he knew that she was giving him the proceeds of prostitution, the United States moved for the opportunity to impeach her, claiming surprise. The defense claimed there was no surprise because the witness had refused to testify in accordance with her previous story to government agents when she was before the grand jury. The government, however, had a right to anticipate that, under oath and in court, she would testify in accordance with her story to the Federal Bureau of Investigation. United States v. Graham, 2 Cir., 102 F.2d 436, 442." (216 F.2d 25.)

Appellant respectfully submits that it was absolutely essential for it to introduce the prior impeaching statements of Mrs. Oldham and that the error of the trial Court in refusing to permit their introduction was prejudicial and requires that this case be returned to the trial Court for a new trial.

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**V. THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE PLAINTIFF'S EXHIBIT NO. 10, AS IT WAS PROPERLY ADMISSIBLE AS A RECORD OF PAST RECOLLECTION.**

Appellant had marked for identification a two-page written statement bearing the signature of Betty Oldham, marked as Exhibit 10. As is set forth above in this Brief, under the Specifications of Error II, which quotes at length from the transcript (pages 49 through 51), Mrs. Oldham read the statement to herself, stat-

ing that she gave the statement to a Mr. Kennedy, that she was at that time telling the truth, that she had the statement read to her and that she signed it. Present at the time were Mr. Kennedy, Mr. Worth Jardine, Chief of Police of the Village of Arco and Mr. Ben Johnson, Sheriff of Butte County, State of Idaho. She was questioned concerning the facts set out in the statement and she repeatedly answered that she did not remember the evidence recited therein. (R.T. 51; 53-54.) Thereupon Appellant offered in evidence Exhibit 10 urging its admissibility on the grounds, among others, that it was a record of past recollection and therefore admissible as evidence. The Court reserved its ruling, but eventually ruled the Exhibit inadmissible. (R.T. 283.)

Appellant respectfully submits that this ruling was error. The proper foundation for the admissibility of the signed statement as evidence of past recollection recorded had been laid—the writing was made shortly after the occurrence; the witness recalled giving the statement; she was telling the truth at the time she made the statement, and that now, even after reading the statement, she could not recall the facts concerning which questions were asked—and its admission was extremely material and pertinent to the case.

The use of the doctrine of past recollection recorded has been generally accepted in this country.

A general summary is set out in 58 Am.Jur. 328, Witnesses, Section 588, which in part is as follows:

> "* * * Gradually, however, the doctrine of the use of records of the past recollection of the wit-

ness has developed until, with perhaps the exception of one or two jurisdictions, it has come to be the generally accepted rule in this country that upon laying a proper foundation to establish the identity and authenticity of the writing in question, a witness may use a memorandum of a past transaction to refresh his memory or, more accurately speaking, may testify therefrom, although he has no independent recollection of the facts or circumstances, and although a consultation of the writing fails to recall a distinct recollection of the circumstances to his memory; it is sufficient if he testifies that he once knew the facts and that a memorandum of them, which he knew to be correct, was made at the time or soon after they occurred. The rule is not subject to the objection that the evidence is hearsay where the memorandum was made by the witness or under his direction. Nor is it subject to the objection that the witness who vouches for the record cannot be properly cross-examined, since as to accuracy of the witness's recollection—the only phase of cross-examination that cannot be gone into—all that could be brought out is shown by the statement that the witness has no present recollection. And generally, the record is itself admissible in evidence in connection with the testimony of the witness. The reason for this rule has been said to be one of necessity."

The question of use of a written statement was presented to the Arizona Supreme Court in the case of *Kinsey v. State* (1937) 65 P.2d 1141, and the Court stated that where a witness, after reading the memorandum, is still unable to recall the facts but testifies

as to the correctness of the memorandum when it was written, then the memorandum itself becomes admissible. The Court is quoted as follows, beginning at page 1148:

> "* * * And this view was somewhat elaborated upon in State v. Easter, 185 Iowa, 476, 170 N.W. 748, 749, as follows: * * *
>
> " 'One may be called as a witness who cannot recall the matter about which he is called to testify. He may not be able to refresh his memory so that he is repossessed of the fact, but it may be made to appear that at some time in the past he had a personal knowledge of the fact, and made a record of it. If then he is able to say that he made the entry, or caused it to be made, and at the time it was his purpose or duty to record the fact as it then existed, the record becomes a competent witness, not because it is a record of an event, but because it speaks the past knowledge of a witness to a fact occurring within the knowledge of the witness, truthfully recorded.'
>
> "Notwithstanding this very forceful and logical reasoning, the American authorities are in hopeless conflict upon the question whether a past recorded recollection of events in general is admissible, but a majority, and we think the better considered, opinions, in civil cases at least, uphold the rule of the admissibility of such memoranda of past recollection recorded when the witness who made them or under whose direction they were made testifies (a) that he at one time had personal knowledge of the facts, (b) that the writing was, when made, an accurate record of the event, and (c) that after seeing the writing, he has not sufficient present independent recol-

lection of the facts to testify accurately in regard thereto. 70 C.J. 595-598, and notes."

In the case of *Putman v. Moore* (5th Cir., 1941) 119 F.2d 246, the rule is stated as follows:

"The general rule, long recognized, is that a witness may use a memorandum that he knows to be correct to refresh his recollection. Obviously, in many cases the witness has no recollection, refreshed or otherwise, of the original transaction. When he testifies he is doing so solely on the faith of the correctness of the memorandum. The rule permitting use of memoranda in aid of oral testimony has been very much broadened in recent years. Wigmore divides the subject into past and present recollection and discusses it fully in his third edition, Section 726 et seq. The modern doctrine is to permit a witness to testify as to past transactions from a memorandum that he knows was accurate at the time it was made, although he has no recollection whatever of the original transaction. This finds support in the following Texas cases: Payne v. Texas Mercantile Co., Tex. Civ. App., 248 S.W. 79; Fire Ass'n of Philadelphia v. Nami, Tex.Civ.App., 77 S.W.2d 260; Southern Pacific Co. v. Cox & Co., Tex.Civ.App., 136 S.W. 103; St. Louis Southwestern Ry. Co. of Texas v. Mitchell, Tex. Civ. App., 127 S.W. 876; Kansas City Southern Ry. v. Rosebrook Josey Grain Co., 52 Tex. Civ.App. 156, 114 S.W. 436."

In holding a statment admissible under such factual situations, the Court in *Asaro v. Parisi* (1st Cir. 1962) 297 F.2d 859, at page 863 states:

"Subsequently, as part of his case, counsel for the defendant put one of his employees named

Cote on the stand who testified that he had interviewed the plaintiff after the accident and had written down what the plaintiff told him but not in the plaintiff's exact words. This witness was allowed without objection to read the statement to the jury, but counsel for the plaintiff objected when the court admitted the statement into evidence as an exhibit. The record is not altogether clear but it would appear that the statement was admitted into evidence as a record of the witness's, Cote's, past recollection, he having testified that while he remembered interviewing the plaintiff he had no independent recollection of what the plaintiff had said. On this ground the statement is admissible in evidence as proof of what the plaintiff had said to Cote and hence to establish the foundation for its use on cross-examination of the plaintiff as a prior contradictory statement."

To this same effect see the following:

*Ettelson v. Metropolitan Life Ins. Co.* (3rd Cir. 1947) 164 F.2d 660, 666;

*Jaeger v. Hackert* (Iowa 1950) 41 N.W.2d 42;

*State v. Gross* (Wash. 1948) 196 P.2d 297;

*United States v. Allied Stevedoring Corp.* (2d Cir. 1957) 241 F.2d 925, 931-933 (Good analysis by Judge Hand).

Section 9-1204, Idaho Code provides as follows:

"9-1204. Refreshment of memory.—A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew

that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution. (R.S., R.C., & C.L., Section 6078; C.S., Section 8033; I.C.A., Section 16-1204.)''

And the proposition urged by Appellant is recognized in Idaho. *Albrethson v. Carey Valley Reservoir Co.* (1947) 67 Idaho 529; 186 P.2d 853. See also 82 A.L.R. 2d 537, 125 A.L.R. 165; *Gencarella v. Fyfe* (1st Cir. 1948), 171 F.2d 419; III Wigmore on Evidence (1940) Sec. 734, p. 64.

The contents of plaintiff's Exhibit No. 10 were extremely important to the defense of an incendiary fire. It directly contradicted Appellees' statements and placed Appellees in the vicinity of the fire shortly before it was discovered. Accordingly, the courts refusal to allow its admission prejudiced Appellant in its presentation of its defense, and requires a reversal of the judgment below.

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## CONCLUSION

Wherefore, it is respectfully submitted that the trial judge should have admitted Exhibit 10 in evidence, whereupon it would clearly be a question for the jury to determine as to the liability, if any, of the Appellees. The evidence of prior inconsistent statements

made by the witness Oldham should have been admitted for all proper purposes to impeach that witness under the claim of surprise.

Further, even without Exhibit 10, and without the other evidence refused by the trial Court, the facts in the record present a jury question on liability as to whether or not there was an incendiary fire and whether or not the Appellees were responsible for it. It necessarily follows that the record in this instance is such that a directed verdict was improper.

Judgment of the trial Court should be reversed and the case returned for a new trial.

Dated, November 24, 1965.

Respectfully submitted,

AUGUSTUS CASTRO,
MERRILL & MERRILL,
*Attorneys for Appellant.*

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CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

AUGUSTUS CASTRO,
By PAUL A. RENNE.

**(Appendix Follows)**

# Appendix.

## Appendix of Exhibits

| Plaintiff's Exhibit No. | Description | Page |
|---|---|---|
| 1 | Insurance Policy, Hartford Fire Insurance Company | |
| 2 | Statement in proof of loss of O. T. and Ruby I. Jones | |
| 3 | Photograph: No. 3 apartment | |
| 4 | Photograph: Rear view of motel | |
| 5 | Photograph: Front view of motel | |
| 6 | Photograph: Motel Unit No. 4 | |
| 7 | Photograph: Motel Unit No. 3 | |
| 8 | Photograph: Motel Unit No. 2 | |
| 9 | Photograph: Motel Unit No. 1 | |
| 10 | For Identification statement of Betty Oldham | |
| 11 | Container with rug, curtains, and plastic items taken from Motel | |
| 12 | Registration card, Mr. O. T. Jones dated June 10, 1963 | |